Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-229

ARMEN DE FILIPPO and SHELDON FLEISHMAN
t/a A & S, *a Partnership*,
Petitioners

v.

FORD MOTOR COMPANY,
Respondent

PETITIONER'S REPLY BRIEF

WALTER W. RABIN
HURD BARUCH
1500 Walnut Street,
Philadelphia, Pa. 19102
Counsel for Petitioners

Of Counsel:
MELTZER & SCHIFFRIN
1500 Walnut Street
Philadelphia, Penna. 19102

THE LEGAL INTELLIGENCER, 69 SOUTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4300

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PETITIONERS' REPLY BRIEF

1. Respondent's Brief in Opposition to the Petition for Certiorari is Based upon a Fallacious Legal Premise.

Respondent's Brief in Opposition to the Petition for Certiorari is based upon a legal premise which: (1) is beyond the scope of the holding of the Court of Appeals; and (2) is unsupported and unsupportable by the decisions of this or any other court.

In its Opposing Brief, Respondent has argued that an affirmative answer to Special Interrogatory No. 2 was a requisite to a finding of a *per se* group boycott, and that the jury's negative answer to that Interrogatory defeated Petitioner's group boycott case. (See pages 6, 10, 14 and "Question presented" of Respondent's Opposing Brief). That Interrogatory asked the jury whether:

> ". . . the *purpose* of the agreement, if any, between Ford and its Philadelphia area dealers was to prevent plaintiffs from becoming Ford dealers in the greater Philadelphia area *on any terms*?" (App. 11a). (Emphasis added).

An affirmative answer to Interrogatory No. 2 would have required a finding of a specific purpose on the part of the conspirators to exclude plaintiffs as Ford dealers in the Philadelphia area *"on any terms"; i.e.*, a purpose to totally exclude plaintiffs from the Philadelphia marketplace.

The Court of Appeals, however, did not hold that a purpose to *totally* exclude plaintiffs from the marketplace was a requisite of a group boycott. To the contrary, the Court held that:

> ". . . a concerted activity constitutes a 'group boycott' and is considered per se 'in restraint of trade' when 'there [is] a purpose *either* to exclude a person or group from the market, *or* to accomplish some other

anti-competitive objective, or both.'" (App. 11a). (Emphasis added).

Thus, even under the holding of the Court of Appeals, an affirmative answer to Interrogatory No. 2 was not a requisite to a finding of a group boycott.

Respondent has not cited a single case to support the premise that a purpose to totally exclude plaintiffs from the marketplace is a requisite of a group boycott. The reason for this is quite obvious; there are no such cases, and indeed, the cases are to the contrary.

As we have pointed out in our Petition for Certiorari, *no* specific purpose is a requisite of a group boycott.[1] In dealing with group boycotts the courts are concerned not with purpose, but with consequences. From this it follows, *a fortiori*, that a purpose to totally exclude is not a requisite of a group boycott. Indeed, it is clear from the decisions of this Court that a group boycott need not even have the *effect* of a total exclusion from the marketplace.

In *United States v. General Motors Corp.*, 384 U.S. 127 (1966), this Court found a group boycott where, as the result of group action, franchised Chevrolet dealers were prevented from selling new Chevrolets to non-franchised dealers (discounters). This Court cited alternative bases for the group boycott finding: (a) that the discounters were denied access to new Chevrolets; and (b) that the franchised dealers were deprived of the opportunity to sell to discounters, if they so chose. Neither the discounters nor the franchised dealers, however, were totally excluded from the automobile marketplace. The discounters were merely denied access to one type of product, new Chevrolets; and the franchised dealers were merely denied

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1. As we have also pointed out, even if, as the Court of Appeals held, an anti-competitive purpose is a requisite of a group boycott, the jury found such a purpose and the record amply supports the finding.

the opportunity to sell one type of product, new Chevrolets, to one type of customer, discounters.

In *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), this Court found a group boycott where, as the result of group action, a securities dealer was denied access to direct telephone lines to members of the New York Stock Exchange. In language quoted at page 16 of our Petition for Certiorari, this Court held it immaterial that the refusal to deal with plaintiff was not total, and held that group action which resulted in a denial of a "business advantage" was enough to constitute a group boycott.

In *Associated Press v. United States*, 326 U.S. 1 (1944), this Court found a group boycott where, as the result of group action, nonmembers of the Associated Press were prevented from buying news from Associated Press or its members. The defendant contended that a group boycott had not been proved because there were three other news agencies from which nonmembers of Associated Press could buy news; *i.e.*, that there was not a total exclusion. This Court rejected that contention, stating, at page 17, that it was sufficient to constitute a group boycott that nonmembers were placed at a "competitive disadvantage".

There are also several Court of Appeals' decisions holding that a total exclusion from the market is not a requisite of a group boycott. See *Ricci v. Chicago Mercantile Exchange*, 447 F.2d 713 (7th Cir.), *aff'd*, 409 U.S. 289 (1973);[2] *Ford Motor Co. v. Webster's Auto Sales*, 361 F.2d 874 (1st Cir. 1966);[3] and *Gamco, Inc. v. Providence Fruit*

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2. A group boycott was found where group action resulted in plaintiff's loss of membership on the Chicago Mercantile Exchange, even though three weeks later plaintiff obtained another membership.

3. A group boycott was found where group action resulted in a used car dealer being deprived of access to only one particular type of car, "factory Fords".

& *Produce Bldg.*, 194 F.2d 484 (1st Cir. 1962), *cert. den.*, 344 U.S. 817 (1952).[4]

In summary, Respondent's Opposing Brief is not based upon the holding of the Court of Appeals, but upon a legal premise which goes well beyond that Court's holding; a premise which Respondent neither attempts to support, nor which can be supported, by citation of cases.

2. Respondent's Brief in Opposition to the Petition for Certiorari is Based upon a Statement of Facts Contrary to the Evidence from Ford's Own Witnesses and Documents.

The argument in Respondent's Opposing Brief is also based upon a statement of facts contrary to the record. We shall not attempt to point out every instance of incorrect references to the record in the Opposing Brief, but only those which go to the nature of the conduct comprising the group boycott, since they are crucial to the legal issue in the case. In so doing we shall not refer to evidence in plaintiffs' case, but only to testimony of Ford witnesses and documents from Ford's files.

At page 3 of Respondent's Opposing Brief, it is stated that the other dealers "protested" to Ford about the "special features" of Ford's deal with plaintiffs for Presidential. It is clear from Ford documents, however, that the dealers went beyond mere protests and made threats to Ford if it went through with the deal with plaintiffs. Thus, in D-64, minutes of Ford's Dealer Policy Board, it is stated

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4. As the result of group action plaintiff, a produce dealer, was excluded from a produce market. The First Circuit held that a cause of action had been made out despite the fact that alternate facilities were available nearby. Although the case was brought as a monopoly case, the Court held (194 F.2d at pp. 488-89) that it might also have been brought as a conspiracy (group boycott) case, and the cases cited by the Court to support its holding were group boycott cases.

that Pacifico, a leader of the "protest", ". . . said he will ask the Company to buy him out if the proposed deal involving Presidential Ford has been or is consummated." (276ex). Indeed, Ford, at page 16 of its Pretrial Memorandum, stated that a "threat" by the dealers was one of the "main grounds" of Ford's decision not to consummate the Presidential deal with plaintiffs.

At page 3 of the Opposing Brief, it is stated that one of the special features of the Presidential deal between Ford and plaintiffs was that plaintiffs could manage Presidential for 90 days after which plaintiffs "might" put their money into the venture, and that the other dealers protested because they feared plaintiffs would use Ford's money to operate Presidential, thereby giving plaintiffs an unfair competitive advantage over them. Ford's deal with plaintiffs, however, was not that after 90 days plaintiffs "might" put their money into Presidential, but that they "would" do so. This is evidenced by P-75, a "Dealer Contact Report" prepared by Dennis Wiggins, Ford's Regional Manager. That report reveals that Wiggins, together with Ford's District Manager and two Assistant District Managers, met with Pacifico to hear the dealers' objections to Ford's deal with plaintiffs for Presidential. One of the objections expressed by Pacifico was that plaintiffs were being permitted a 90 day "trial period". (118ex). Wiggins, however, advised Pacifico that this was a "misunderstanding" on Pacifico's part and that after the specified period plaintiffs "*would* invest their money". (119ex). (Emphasis added).

Furthermore, a complaint that plaintiffs would gain an unfair competitive advantage over the other dealers by operating Presidential with Ford's money for 90 days makes no sense under the record in this case. Presidential had been operated as a "company store", with Ford's money, for years before plaintiffs got into the picture; and D-42, a letter from Matthews, one of the protesting dealers, to Naughton, Vice-President of Ford, confirming

the "agreement" between Ford and the dealers, stated that one of its terms was that "The present deal with . . . (plaintiffs) is a dead issue and that Ford will continue to operate this facility as a Company Store until arrangements can be made to sell the location to a qualified buyer." (267ex). Thus, it is clear that the other dealers were much more concerned about Presidential being operated by plaintiffs than they were with Presidential being operated indefinitely as a company store with Ford's money.

Furthermore, two of the other dealers, Pacifico and Matthews, testified as Ford witnesses that without "concessions" of the sort contained in Ford's deal with plaintiffs, Presidential could not be operated profitably, but that nevertheless they objected to Ford granting plaintiffs such concessions. They reluctantly conceded that the logical deduction to be drawn from their testimony was that what they really wanted was that Presidential be shut down (418a-419a, 595a); and they admitted in their testimony that they had frequently suggested to Ford that Presidential be shut down. (409a, 600a-601a). Additionally, Jack Mendel, Ford's District Manager, testified that Valentino, one of the dealers objecting to the "special concessions" to plaintiffs, had offered to pay Ford one half the rent for Presidential that plaintiffs had agreed to pay; and that Pacifico, the principal objector, had offered to buy Presidential from Ford for "10 cents on a dollar", but that Ford had rejected these offers. (550a, 552a-553a).

From this evidence from Ford's own witnesses and documents, it is clear that the other dealers were not really concerned with the so called "special concessions" to plaintiffs; and that their real concern was that if they could not acquire Presidential themselves at a bargain price, they wanted to prevent plaintiffs from acquiring Presidential upon terms whereby plaintiffs might be successful, so that ultimately Ford would be forced to close down Presidential, thereby eliminating a competitor.

At page 4 of the Opposing Brief, it is stated that the other dealers "*never* objected" (emphasis by Ford) to plain-

tiffs becoming Ford dealers "at Presidential *or any other dealership*". (Emphasis added). Again, this is contrary to the evidence from Ford documents and Ford witnesses. Thus, Pacifico testified that he objected to Ford permitting Chestnut, the dealership which plaintiffs had operated successfully before it was damaged by fire, to be repaired and reopened, as plaintiffs wished to do. (596a-597a); and this is confirmed by a memorandum of Ford's Dealer Policy Board. (D-64, 286ex). The reason for Pacifico's concern that Chestnut not be reopened by plaintiffs is clearly explained by D-116 (358ex-367ex), a market study prepared by Ford, which reveals that Pacifico's dealership was located near Chestnut, and that during the period plaintiffs operated Chestnut, Chestnut's sales increased dramatically, whereas Pacifico's sales dropped sharply.

At page 4 of the Opposing Brief, it is stated that Ford's legal department advised Ford that offering a deferred rent plan to plaintiffs would create a Robinson-Patman Act problem unless it was also offered to other dealers, and that ". . . Ford then *discussed* with other dealers the *possibility* of offering them deferred rent plans. . . .". (Emphasis added). Ford documents and witnesses, however, disclose that Ford did not merely discuss the possibility of offering a deferred rent plan to other dealers, but that Ford actually offered the plan to the other dealers. Thus, P-75, the "Dealer Contact Report" prepared by Wiggins, Ford's Regional Manager, states that at a meeting Wiggins held with Pacifico "We further stated we would accord any other dealer in the market the same deferred rent program. . . ." (119ex); and in his testimony Wiggins admitted that Pacifico was the acknowledged leader of the other dealers and that by making the offer through Pacifico he knew it would reach the other dealers (618a-619a). Thus, any possible Robinson-Patman Act problem which the deferred rent plan might have created was obviated when Ford took the advice of its legal department and offered a deferred rent plan to the other dealers.

At page 4 of the Opposing Brief, reference is made to the "objectionable special terms" of Ford's deal with plaintiffs for Presidential, and at page 5 it is stated that on January 9, 1970 Naughton, Vice-President of Ford ". . . travelled to Philadelphia and announced his decision to the dealers" not to go through with the deal. The inference is that there were features in Ford's deal with plaintiffs which were "objectionable" *to Ford*, and that Naughton merely came to Philadelphia to "announce" his unilateral decision to the other dealers. Again, Ford documents and witnesses are to the contrary.

Thus, Geoffrey Curran, national head of Ford's Dealer Development program, testified that the proposed sale of Presidential to plaintiffs "would certainly be beneficial to us", and that "we would like very much to have sold it" to plaintiffs (388a); and D-64, a memorandum of Ford's Dealer Policy Board, discloses that William Heller, Ford's National Sales Manager, considered the terms of Ford's deal with plaintiffs to be reasonable (280ex-281ex). Indeed, Wiggins, Ford's Regional Manager, met with Pacifico on January 7, 1970 and attempted to convince him that the terms of Ford's deal with plaintiffs were fair and not special concessions to plaintiffs, and that the dealers should withdraw their objections. (See Wiggins testimony 614a-615a and the Dealer Contact Report he prepared, P-75, 117ex-120ex).

Furthermore, Ford documents and witnesses reveal that Naughton, on January 9, 1970 did not just "announce" to the other dealers a decision not to proceed with the Presidential deal with plaintiffs. To the contrary, P-76, a memorandum of that meeting prepared by Ford's District Manager, Mendel, discloses that Naughton told the dealers that "inasmuch as *they* were opposed to the proposition" (emphasis added) Ford would not go through with it, because Naughton "had no intention of disturbing eleven dealers for the sake of one dealership." (122ex). Phillip Rulli, Ford's Assistant District Manager, who was

present at that meeting, testified that before Naughton announced his decision to the dealers there was "heated discussion" by the dealers who "were pretty hot about it". (534a). It should also be noted that Naughton's meeting with the other dealers was on January 9, 1970, just two days after Ford's Regional Manager, District Manager, and two Assistant District Managers had met with Pacifico to try to convince him that Ford's deal with plaintiffs was a fair one and that the other dealers should withdraw their objections.

At page 11 of the Opposing Brief, it is stated that ". . . coercion was not even suggested as an issue" in this case. We would respectfully suggest that from the foregoing, and a great deal more contained in the record, it is clear that coercion was not only suggested, but was proved by Ford's own documents and witnesses.

Respectfully submitted,

WALTER W. RABIN
HURD BARUCH
Counsel for Petitioners

Of Counsel:

MELTZER & SCHIFFRIN
1500 Walnut Street
Philadelphia, Pennsylvania 19102
(215) KI 6-6200